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No. 08-606

Supreme Court, U.S.
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In the Supreme Court of the United States

Florence Hervey,

Petitioner,

v.

County of Koochiching; Sheriff Duane Nelson, individually and in his official capacity; and Undersheriff John Mastin, individually and in his official capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly affirmed the District Court's grant of summary judgment on Petitioner's retaliation claim where Respondents had no actual or constructive knowledge of Petitioner's protected conduct until after she engaged in misconduct that was the basis for discipline?

2. Whether the Eighth Circuit correctly affirmed the District Court's grant of summary judgment on Petitioner's retaliation claim that was based solely on temporal proximity?

3. Whether the Eighth Circuit correctly affirmed summary judgment on Petitioner's gender discrimination claim due to Petitioner's failure to establish that she was treated differently than a similarly situated male employee?

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STATEMENT OF THE CASE AND THE FACTS

Petitioner Florence Hervey ("Hervey") initiated this action against her employer, Koochiching County, former Sheriff Duane Nelson and former Undersheriff John Mastin (collectively "Respondents") alleging employment discrimination based on disparate treatment because of her gender, hostile work environment based on gender, and retaliation under Title VII, 42 U.S.C. § 2000e, *et seq.* and the Minnesota Human Rights Act, Minn. Stat. § 363A.01, *et seq.* Hervey also asserted a claim against Koochiching County for a violation of the Minnesota Government Data Practices, Minn. Stat. § 13.01, *et seq.* On June 9, 2008, the Eighth Circuit Court of Appeals affirmed summary judgment for Respondents, which was granted by the United States District Court for the District of Minnesota on October 20, 2006. The Eighth Circuit also denied Hervey's Petition for Rehearing En Banc on August 5, 2008. The District Court subsequently entered judgment consistent with the Eighth Circuit's decision on September 26, 2008.

Hervey was employed by Koochiching County beginning in 1976 as a jailer dispatcher. She remained in that position until she was promoted to

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[1] Citations in the form "Pet." are to Petitioner's Petition. Citations in the form "Pet.'s App." are to the Appendix to the Petition.

the position of Jail Administrator effective February 12, 2001. At the time of her promotion, the Undersheriff was Robert Byman, who retired April 30, 2003. Nelson appointed John Mastin as Byman's replacement.[2]

Hervey alleges in her Petition that she had not received any significant job criticisms during her employment with the County. This is incorrect. Byman testified in his deposition to disputes and criticisms of Hervey.[3] No performance evaluations were conducted of Hervey during her employment until 2004, when the evaluation of all staff was commenced.

The Sheriff, consistent with his authority as an elected official, developed a chain of command for the Sheriff's Office which required Hervey to report to Mastin. A memo outlining the chain of command was issued in April 2003.[4]

At an April 2003 meeting between Byman, Nelson, Mastin and Hervey, Hervey objected to the chain of command, arguing without reference to any legal authority that only the County Board could make such a change.[5] Both Hervey and Nelson raised their voices, with Hervey stating that she would not report to Mastin and that the duly elected Sheriff did not have the authority to change the reporting structure in his own office.[6] Nelson told

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[2] Pet.s' App., A-2.
[3] Respondents' Appellate Brief, p. 11, 54, Appendix 204-207.
[4] Pet.'s App., A-41.
[5] Id.
[6] Id., A-42.

Hervey that she was "disrespectful."[7] Hervey stated that Nelson had "respectful workplace issues."[8] She did not allege any form of harassment or discrimination based on gender or any other protected class, nor did she file a complaint under the County's Respectful Workplace Policy.

The County's Respectful Workplace Policy prohibits discrimination as well as "rudeness," "angry outbursts" and "disrespectful language," whether or not such conduct is related to protected class status.[9]

Throughout the summer and fall of 2003, Hervey repeatedly failed or refused to follow directives issued to her by Mastin and Nelson and engaged in acts of insubordination, including the requirement to review her budget to determine ways to save money in the midst of a budget crisis and instead issuing a memo saying not a dime could be reduced and recommending a significant *increase* in her staff.[10] Hervey repeatedly violated a departmental directive and directly contacted both the County Attorney and County Board regarding internal department matters without prior approval of the Sheriff.[11] At no time during any discussions with Nelson and Mastin, when confronted regarding her misconduct did Hervey ever allege gender based harassment or discrimination, nor did she file a complaint alleging such pursuant to the County's internal policy.

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[7] Id., A-17.
[8] Id., A-3.
[9] Pet.'s App., A-17.
[10] Id., A-42.
[11] Id., A-3.

Due to the budget crisis, both Nelson and Mastin took on additional duties.[12] After Hervey refused to examine ways to find cost savings in the jail, the County Board looked at eliminating her position. Nelson fought to save the position and was successful. However, in order to save money, Hervey was assigned to work two hours per day as a corrections officer.[13]

Hervey's performance evaluation was conducted on February 6, 2004. Hervey was given high ratings for her knowledge of the position and productivity, but low ratings for teamwork, judgment and dependability. She was found to be supportive of her own staff in the jail, but needed to become a team player in the overall department.[14]

Hervey took off February 10 and 11, 2004 without speaking to either Nelson or Mastin. She stayed home those days and drafted a document claiming unfair treatment in response to the evaluation.[15]

Mastin called Hervey at home on February 11 and asked why she had not been at work the prior day and told her he wanted to meet with her the next morning regarding her absences.[16] At the meeting on February 12, Mastin informed Hervey that he had not received any voicemail message from her or her

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[12] Pet.'s App., A-44.
[13] Id., A-4.
[14] Id.
[15] Id.
[16] Id., A-5.

co-worker[17] regarding her intent to be absent and her missing two days of work without speaking to either him or Nelson directly.[18] Mastin told Hervey that he intended to recommend to Nelson that she be disciplined for her conduct.[19] Hervey then informed Mastin that she intended to file a complaint with the Minnesota Department of Human Rights.[20]

Hervey met with County Coordinator Jaksa on February 12 and informed her that Mastin was intending to recommend discipline to Sheriff Nelson.[21] Hervey told Jaksa she felt she was being treated improperly by Mastin and that he was controlling her too much for her to do her job.[22] Jaksa contacted the Sheriff and the meeting scheduled for that afternoon was postponed. Jaksa informed Hervey of her right to file a respectful workplace complaint under the County's policy, and Hervey indicated she would like to do so.[23] Jaksa further informed Hervey that it would not be appropriate for her to investigate the complaint, as she knew all of the parties and that she would be leaving on vacation the next day.[24] Jaksa informed Hervey that she would follow-up with her once Jaksa returned.[25] The

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[17] Hervey alleges, citing only her brief as evidence, that Mastin admitted to receiving a voice mail from a co-worker, which Respondent disputes.

[18] Pet.'s App., A-52.

[19] Id.

[20] Id.

[21] App. to Resp. Appell. Brief, 139.

[22] Id., at 140.

[23] Id.

[24] Id.

[25] App. to Resp. Appell. Brief, 140.

claim in her Petition that the Jaksa refused to take her complaint is misleading at best.

Hervey hired an attorney who contacted the County Attorney on February 13, 2004 to schedule a meeting, which was then postponed until Jaksa returned from vacation.[26] When Jaksa returned from her vacation, she e-mailed Hervey asking if she wanted to file a complaint pursuant to County policy at that time.[27] Hervey responded that she would do so through her attorney.[28]

Mastin and Nelson rescheduled the meeting with Hervey for February 17, 2004. At that time, Mastin had been informed that Hervey had been in his office when he was not present going through files in his office. Hervey did not need a master key to perform her job duties and Mastin was concerned about confidential files in his office. Therefore, her master keys were removed from her and a memo issued regarding her job duties on February 18, 2004.[29]

On February 18, 2004, after the meeting with Nelson, Mastin and Hervey on February 17, Hervey's attorney sent another letter to the County making additional allegations.[30] The meeting with Hervey regarding her absence from work on February 10th and 11th was finally scheduled for March 2, 2004, primarily due to the intervention of her attorney.

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[26] Id., at 120.
[27] Id., at 95-96.
[28] Id., at 141.
[29] Pet.'s App., A-53.
[30] App. to Resp. Appell Brief. 186-189.

On March 12, 2004, Hervey's attorney issued a Notice of Claim to the County.[31] The County began a respectful workplace investigation through an outside investigator. The investigator interviewed Hervey, Mastin and other witnesses and issued a report concluding that the allegations were unsubstantiated.[32] Hervey was notified of this on May 21, 2004.[33] Six days later, Hervey, through her attorney, sent a letter to the EEOC alleging discrimination, followed by a charge of discrimination dated June 14, 2004.[34]

Hervey falsely alleges that Mastin, along with other armed officers, forced his way into her attorney's office. This claim is spurious. The undisputed facts establish that the visit to Biggins' office on May 28, 2004, was instigated and controlled by the International Falls Police Department.[35] Mastin was merely called by that Department as backup. There is absolutely no evidence of forcible entry in the record.

Both Hervey and a male employee were warned in June 2004 about using a County credit card for the purchase of alcohol, which is a clear violation of County policy. There is no evidence of any other employees using County credit cards for such purposes that were treated differently.

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[31] Id., at 195-202.
[32] Id.
[33] Id.
[34] Id.
[35] Resp. Appell. Brief, App. 216-222.

Moreover, Hervey was the male employee's direct supervisor.[36]

Hervey persisted in violating directives throughout 2004 and 2005, including her ongoing insubordination in refusing to meet with Mastin on a daily basis to update him regarding the jail, even though their offices were only ten feet apart, as well as other numerous documented issues.[37] Due to her ongoing misconduct, Hervey was suspended for five days in March 2005 and fifteen days in July 2005.[38] The March 2005 suspension was for 1) her continued refusal to meet with Mastin as directed, and 2) implementing actions that were inconsistent with policies, procedures and job duties.[39] The July 2005 letter set forth sixteen specific grounds for the suspension, including but not limited to insubordination for her ongoing refusal to meet with John Mastin on a daily basis and failure to comply with other directives and meet job expectations.[40] Hervey was given the opportunity to provide Nelson with any information rebutting the stated grounds, but did not do so.[41]

Hervey falsely states in her Petition that she was suspended for explaining to a union employee her rights before investigating a possible workplace violation. First, this incident occurred in August 2005, following her return from suspension. Second,

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[36] Pet.'s App., A-22.
[37] Pet.'s App., A-7.
[38] Id., A-54.
[39] App. Resp. Appell. Brief 7-9.
[40] Id., at 131-134.
[41] Id.

it involved Hervey questioning the person assigned as acting jail administrator during her suspension regarding what she had been doing while Hervey was gone. Further, this did not involve explaining union employment rights, but involved the issuance of a Garrity warning without authorization from either the Sheriff or County Attorney.[42] See Garrity v. New Jersey, 385 U.S. 493 (1967).

Hervey raises the issue of Mastin asserting on his application for his law enforcement license more than twenty-five years before the commencement of this lawsuit that he was not a felon. Mastin received a pardon for the underlying offense more than two decades before he became Undersheriff.[43]

Hervey falsely alleges that Mastin violated a union contract by failing to notify an employee of the right to representation. There is no obligation for an employer to notify a union member of the right to representation; it is up to the employee to request such representation.

Hervey brought suit against the County for alleged violation of her rights pursuant to the Minnesota Government Data Practices Act. Her claim was dismissed by the District Court. Hervey's contention that private personnel data was published in the newspaper is false.

Rich Mastin is a backup deputy who occasionally fills in at the Koochiching County Sheriff's Office.[44] He is not regularly scheduled there. He has no supervisory or administrative duties. His

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[42] App. Resp. Appell. Brief, p. 19-20.
[43] Pet.'s Appell. Brief, p. 4.
[44] Pet.'s App., A-61.

full-time job is as Police Officer at the International Falls Police Department.[45] Rich Mastin was involved in a car accident while intoxicated.[46] His full-time employer suspended him. The Sheriff concurred with the discipline meted out by the City. The conduct was unrelated to his sporadic employment with the County.[47]

REASONS FOR DENYING THE PETITION

The arguments set forth in Hervey's Petition fail to demonstrate that a Writ of Certiorari should be granted in this case. The Eighth Circuit's decision affirming summary judgment in favor of Respondents is well-reasoned and consistent with controlling precedent. Hervey simply disagrees with the outcome. She has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. See Sup. Ct. R. 10.

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT HERVEY'S REFERENCE TO THE RESPECTFUL WORKPLACE POLICY WAS NOT PROTECTED CONDUCT UNDER TITLE VII.

In her Petition, Hervey attempts to confuse the issues by claiming that the Eighth Circuit held that opposing an employer practice by resorting to an internal policy against discrimination and harassment is not protected conduct. See Pet., p. 13.

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[45] Id.
[46] Pet.'s App., A-62.
[47] Id.

However, the Eighth Circuit's decision did not diminish the standard for protected conduct and is consistent with this Court's rulings. See Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). Rather, the Eighth Circuit simply applied the law and determined that Respondents had no actual or constructive notice that Hervey had engaged in protected conduct under Title VII or the Minnesota Human Rights Act at the time that she had only referenced the Respectful Workplace Policy, but did not give any indication that she was alleging gender discrimination or harassment.

A. The Eighth Circuit's Decision does not Leave Employees who Resort to Internal Anti-Discrimination and Anti-Harassment Policies Unprotected.

Hervey attempts to portray the Eighth Circuit's decision as a setback to an employee's right to be free from retaliation for engaging in protected conduct is unpersuasive. Even if Hervey's brief mention of "respectful workplace issues" in April 2003 could be characterized as resorting to her employer's internal policy, she gave no indication that she was claiming gender discrimination or harassment under Title VII. The rights of an employee who actually does resort to his or her employer's internal policy to oppose an employer's unlawful discrimination or harassment are unaffected by the Eighth Circuit's decision in this case.

The Eighth Circuit dismissed Hervey's contention that she engaged in protected conduct as far back as April 11, 2003 when she first referred to respectful workplace issues. Pet.s' App., A-17. As the Court noted, the Respectful Workplace Policy applies to rude or disrespectful comments not based on unlawful discrimination, and Hervey's comments did not indicate that her issues were related to gender discrimination or harassment based on protected status. Id. As a result, Respondents had no actual or constructive knowledge of protected activity by Hervey as of April 2003. Id.

Hervey's first comment that could be construed as referencing the County's Respectful Workplace Policy on April 11, 2003 was not articulated as a gender discrimination or harassment issue. Hervey simply claimed that Nelson had "respectful workplace issues" and she gave no indication that her complaint was for anything more than rude or angry comments, which would be inconsistent with the Policy. See Pet.'s App., A-17. Unlike the facts of the cases cited by Hervey in her Petition, the record in this case demonstrates that Respondents could not have unlawfully retaliated against Hervey because they had no reason to believe she was complaining of conduct that might be protected by Title VII.

By the time Hervey did engage in Title VII protected conduct on February 12, 2004, by telling Mastin that she was filing a claim with the Minnesota Department of Human Rights, Hervey had already been accused of repeated acts of insubordination and was facing discipline for being AWOL. Id. The Eighth Circuit correctly

distinguished Hervey's allegations of retaliatory actions as simply the logical consequence of Hervey's pre-existing disciplinary problems. Pet.s' App., A-19. Despite Hervey's best efforts to shield herself from legitimate discipline by interjecting announcements of her discrimination claim, the Eighth Circuit correctly determined that Hervey could not create a submissible case of unlawful retaliation.

Moreover, the Eighth Circuit's decision is consistent with controlling precedent. In support of her Petition, Hervey relies on this Court's decision to consider Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 211 Fed. Appx. 373 (6th Cir. 2006). Hervey alleges that she, like the plaintiff employee in Crawford, has been left unprotected from retaliation because she used the County's internal policy to assert her claim. However, in Crawford, the employee had cooperated with her employer's internal investigation of sexual harassment and clearly asserted that her employer had sexually harassed her. Id. Unlike the employee in Crawford, Hervey never once mentioned gender discrimination or harassment until February 12, 2004, well after she was already having extensive disciplinary problems.

In Evans v. City of Houston, the plaintiff testified at a grievance hearing about allegations of racial and age discrimination. 246 F.3d 344 (5th Cir. 2001). Likewise, in Kotcher v. Rosa and Sullivan Appliance Center, Inc., the plaintiff made an internal complaint to protest sexually harassing actions of her supervisor. 957 F.2d 59 (2nd Cir. 1992). Finally, in E.E.O.C. v. Total Systems Services, Inc., the plaintiff

participated in an internal investigation and made allegations of explicit sexual harassment. 221 F.3d 1171 (11th Cir. 2000). The cases cited in Hervey's Petition do not address situations in which an employee referenced a general internal policy, but failed to indicate that the alleged complaint was based on discrimination or harassment.

Indeed, there is no support for the proposition that Hervey engaged in protected conduct simply by making a comment about "respectful workplace issues" in the context of discussing rude and angry behavior. The Eighth Circuit has not left Hervey unprotected simply because she used her employer's internal policy to bring forth her claims, but rather because she did not indicate anything about gender discrimination or harassment when she initially commented about "respectful workplace issues" prior to February 2004.

Contrary to Hervey's assertion, the Eighth Circuit's decision does not preclude an employee who uses an internal complaint procedure from coming under the protection of Title VII's anti-retaliation provisions. The decision simply reinforces that an employer cannot unlawfully retaliate against an employee if it has no reason to believe that the employee has engaged in protected conduct under Title VII. Hervey's claim that the Eighth Circuit's decision is in conflict with the decisions of other Courts of Appeal is disingenuous. None of the cases cited in her Petition relate to a situation in which the employer did not know that the employee had engaged in protected conduct under Title VII.

Interestingly, Hervey fails to discuss this Court's recent decision in White v. Burlington No. and S.F.R. Co., which addressed retaliation claims. 548 U.S. 53 (2006). The White decision does not remove the requirement that employees must establish a prima facie case of retaliation, including requiring a causal nexus between the protected conduct and the adverse employment action. Id. The Eighth Circuit applied the appropriate legal standards, as articulated in White, to the facts of this case and correctly dismissed Hervey's retaliation claim as a matter of law.

B. Hervey did not Oppose a Practice by Resort to Respondents' Internal Policy against Discrimination and Harassment.

Hervey bases her first argument for seeking a Writ on the misguided notion that she opposed a practice of her employer by resorting to the Respectful Workplace Policy. However, the record clearly reflects that Hervey did not take advantage of the internal procedures available to her under the Respectful Workplace Policy until February 2004. Prior to that, she never filed a complaint under the Policy or pursued any of the procedures to do so. Instead, Hervey simply relies on a comment she made during a conversation with Nelson about having "respectful workplace issues" as the basis for her claim that she resorted to her employer's internal policy. Pet.'s App., A-17. The Eighth Circuit correctly found that, under the circumstances, Hervey cannot be said to have engaged in protected

conduct in April 2003 or any time in 2003. Id. Accordingly, Hervey's concern about the Eighth Circuit's decision resulting in leaving employees who resort to internal policies unprotected under Title VII is clearly misplaced. Hervey never actually resorted to the internal policy herself. The first time that she informed the County that she wanted to file a complaint was not until February 12, 2004.

This Court has held that an employee's unreasonable failure to participate in an employer's internal complaint procedure may be an affirmative defense to liability. Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998). In this case, Respondents maintained a Respectful Workplace Policy, which encompassed prohibitions against gender discrimination and harassment, yet Hervey failed to take advantage of any preventative or corrective opportunities provided by the Policy. Her claims of being unjustly penalized by losing anti-retaliation protections under Title VII have no merit. Not only did she not engage in protected conduct under Title VII until February 12, 2004, but she never resorted to the County's internal Respectful Workplace Policy.

II. THE EIGHTH CIRCUIT'S DECISION CORRECTLY DETERMINED THAT HERVEY COULD NOT ESTABLISH CAUSATION BY TEMPORAL PROXIMITY ALONE.

Both the District Court and the Eighth Circuit correctly concluded that Hervey did not produce sufficient evidence of a causal connection to support

her retaliation claim. In Hervey's opinion, the mere fact that she filed a complaint of discrimination tied all future (and even past) actions by her employer back to that complaint, and resulted in retaliation. Hervey relied solely upon the timing of her actions, which she was able to manipulate, in relation to the alleged adverse employment actions to assert her retaliation claim. However, despite Hervey's best efforts to time her complaints to when she expected to be disciplined for prior conduct, she was unable to demonstrate the evidence necessary to support a causal connection in this case.

Hervey's behavior both before and after she filed a discrimination complaint weighs against a finding of a causal connection. Hervey's acts of misconduct after she engaged in protected conduct were worthy of discipline in their own right and did not require an inference of retaliatory motives by Respondents. Hervey repeatedly failed or refused to follow directives and engaged in insubordination. Respondents provided ample evidence of legitimate non-retaliatory reasons for their actions, but Hervey failed to provide any evidence of pretext.

Moreover, Hervey's filing of a complaint prior to *some* of her misconduct cannot insulate her from the legitimate consequences of that misconduct. As the Eighth Circuit observed, insubordinate employees cannot insulate themselves from discipline by announcing an intention to claim discrimination just before the employer takes action. Pet.'s App., A-24. The evidence in this case demonstrates that this is precisely what Hervey attempted to accomplish. Hervey's conduct during the February 12, 2004

meeting with Mastin is a perfect example of Hervey's attempts to avoid responsibility for her misconduct and take advantage of the situation to turn legitimate discipline into a basis for a retaliation claim. Coincidental timing and Hervey's belief of Respondents' nefarious motives, no matter how strongly-held the belief may be, cannot avoid summary judgment.

Hervey claims that summary judgment is not appropriate because Respondents did not provide evidence that Mastin intended to discipline Hervey before she informed him of her discrimination complaint. The Eighth Circuit correctly noted that Respondents did not bear the burden to show that they already intended to discipline Hervey before she interjected that she had engaged in protected conduct. Pet.'s App., A-20. The burden of persuasion remains with Hervey to show that more than temporal proximity supports her claim. Id. The record is clear that Mastin scheduled a meeting with Hervey to discuss her absence from work. It further shows that Hervey's announcement of her complaint occurred after Mastin accused her of taking leave without providing proper notice and lying about it. The mere fact that Hervey opportunistically informed Mastin of her complaint during the same meeting that she was informed of the intended consequences of her conduct cannot serve as the basis for a retaliation claim on its own. Moreover, regardless of when Hervey made the complaint, Hervey was indeed AWOL from work prior to the meeting with Mastin, making her claim that the discipline was unwarranted disingenuous at best.

A. Respondents have Produced Evidence of Their Legitimate Non-Retaliatory Reasons for Their Actions.

The record in this case is replete with Hervey's performance deficiencies and insubordination. Deficient performance and personality conflicts are legitimate, non-retaliatory reasons for adverse employment actions. See, e.g., Hannoon v. Fawn Eng'g Corp., 324 F.3d 1041, 1047 (8th Cir. 2003). The fact that Hervey was pursuing a discrimination complaint at the same time as her misconduct does not justify or excuse her misconduct. In addition, the question is not whether Hervey actually had poor performance, was insubordinate, or whether Respondents needed to make administrative changes due to budget cuts, but rather whether Respondents believed this to be the case when their actions were taken. See Hitt v. Harsco Corp., 356 F.3d 920, 924 (8th Cir. 2004).

The undisputed need to reduce costs due to budget constraints, Hervey's poor performance and insubordination, and personality conflicts between Hervey and Mastin based on Mastin's management style, which differed from that of Hervey's previous supervisors, constituted legitimate business reasons for Respondents' actions. None of these reasons were contradicted by evidence produced by Hervey. As the Eighth Circuit's decision points out, there is no evidence that the Respondents' motive for taking these actions was in retaliation for her engaging in protected conduct. Pet.'s App., A-25.

Although Hervey may disagree with the wisdom of Respondents' disciplinary and managerial decisions, Title VII does "not prohibit employment decisions based upon poor job performance, erroneous evaluations, personal conflicts between employees, or even unsound business practices." Hill v. St. Louis University, 123 F.3d 1114, 1120 (8th Cir. 1997) (quoting Hutson v. McDonnel Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995)). Nor does Title VII "entitle courts to 'sit as super-personnel departments,' second-guessing the wisdom of businesses' personnel decisions." Id.

Hervey attempts to spin her failure to produce evidence as the Court resolving factual issues in favor of Respondents. However, the Eighth Circuit simply held Hervey to her burden to produce evidence beyond mere timing to support a reasonable inference of pretext and retaliatory motive. Without the Eighth Circuit's adherence to the standards established for retaliation claims, employers could never address performance or misconduct issues without fearing a retaliation claim. Hervey failed to meet her burden and her Petition is simply a last-ditch effort to create fact issues out of nothing more than temporal proximity.

Hervey claims that the Eighth Circuit's decision is contrary to other Circuits' holdings that employers must show a legitimate business reason with evidence in the record. Pet., p. 20. However, the Eighth Circuit's decision in this case is consistent in requiring the employer to provide evidence of non-retaliatory reasons for its actions. The difference is that, unlike the employers in the cases cited by

Hervey, the Respondents in this case met their burden by providing evidence of Hervey's insubordination, poor performance, personality conflicts with Mastin, and the County's budgetary constraints. Hervey, however, was unable to produce any evidence to support an inference of retaliatory motive. Pet.'s App., A-21.

In Mickey v. Zeidler Tool and Die, Co., cited by Hervey, the employee was able to present evidence that the employer's reasons were merely a pretext for retaliating against the employee and the alleged performance deficiencies and unavailability of work asserted by the employer had no basis in the record. 516 F.3d 516 (6th Cir. 2008). The employer's proffered reasons of performance deficiencies and dwindling availability of work for plaintiff were easily shown to be pretext where the employee had no record of discipline or negative evaluations and the employer had run advertisements seeking additional employees. Id., at 527.

Likewise, in Davis v. Team Electric Co., also cited by Hervey, the employee was able to provide evidence that the employer's proffered economic reason for laying her off was pretextual. 520 F.3d 1080 (9th Cir. 2008) (employer retained less senior electricians and employer conceded that employee was a skilled and dedicated worker).

These cases differ from the present case where Hervey has completely failed to produce evidence of pretext, and instead, simply asserts that the reasons are false. However, simply disagreeing with the employer's proffered reasons is not sufficient; the employee must provide evidence to support a

reasonable inference of retaliatory motive. The Eighth Circuit correctly concluded that summary judgment was appropriate because Hervey could not provide any evidence beyond her beliefs of Respondents' retaliatory motives. Accordingly, Hervey has not met her burden and summary judgment is appropriate.

III. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED SUMMARY JUDGMENT ON HERVEY'S GENDER DISCRIMINATION CLAIM BECAUSE SHE FAILED TO SHOW THAT SHE WAS TREATED DIFFERENTLY THAN A SIMILARLY SITUATED MALE EMPLOYEE.

Hervey completely failed to meet her burden of proof on her disparate treatment gender discrimination claim against Respondents. Hervey failed to produce any direct evidence of discrimination. However, the true weakness of Hervey's gender discrimination claim is that she failed to show that she was treated differently than similarly situated male employees. The comparators offered by Hervey were not similarly situated to her because of the vast differences in positions, duties, and conduct. Hervey ignores all similarly situated factors other than conduct in an attempt to raise doubt about the Eighth Circuit's decision. Despite her arguments relating to the semantics of the conduct factor, Hervey still fails to establish that Mastin or his step-son were similarly situated to her, and thus, she cannot satisfy her burden on her gender discrimination claim.

A. Hervey Failed to Identify any Similarly Situated Male Employees Who were Treated Differently.

In a futile attempt to meet her burden, Hervey alleged that she was treated less favorably than Mastin and Mastin's step-son, Rich. It is the plaintiff's burden to demonstrate that similarly situated employees were not treated equally. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). Hervey's comparisons, as the Eighth Circuit found, were unpersuasive because neither of them were "similarly situated" to her. The alleged inter-Circuit conflict regarding comparisons of conduct for similarly situated employees does not support Hervey's case. The comparison of conduct is only one factor in the similarly situated analysis. See Tolen v. Ashcroft, 377 F.3d 879, 882 (8th Cir. 2004) ("To be similarly situated, the comparable employees 'must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.'") In her Petition, Hervey attempts to ignore the other factors and focus solely on the conduct comparison.

While Hervey focuses on the variations of the wording that other Circuits have used to compare the conduct of employees for similarly situated disparate treatment analysis, she fails to address the fact that, regardless of the disparity of the conduct, she is not similarly situated to Mastin or his step-son. In order to be similarly situated, "[i]ndividuals used for comparison must have dealt with the same supervisor, have been subject to the same standards,

and engaged in the same conduct without any mitigating or distinguishing circumstances." Clark v. Runyon, 218 F.3d 915, 918 (8th Cir. 2000), citing Lynn v. Deaconess Med. Ctr.-W. Campus, 160 F.3d 484, 487-88 (8th Cir. 1998).

The Eighth Circuit is not alone in considering a comparator's position, duties, and supervisor along with the conduct at issue. In her Petition, Hervey lists a case from each Circuit in an attempt to display a conflict in the similarly situated standard. However, the variations cited address only the comparable conduct factor for determining whether an employee is similarly situated. Hervey completely overlooks the other factors, such as position, duties, and supervisors, to draw the conclusion that there is a Circuit split. A careful and more thorough review of the similarly situated standards demonstrates that Hervey's sole reliance on the comparable conduct factor is misguided. Many of the cases cited by Hervey involve employees holding the same position with the same duties as the plaintiff. None of the cases involve employees found to be similarly situated even though they hold different positions with drastically different duties and report to different supervisors.

In her Petition, Hervey cites to a First Circuit case, Garcia v. Bristol-Myers Squibb Co., for the proposition that comparators need not be perfect replicas, but must "closely resemble one another in respect to relevant facts and circumstances." 535 F.3d 23, 31 (1st Cir. 2008). Hervey neglects to point out that the plaintiff in the Garcia case and her

comparator were both project engineers with the same supervisor.

Hervey's Second Circuit case, Graham v. Long Island RR, involved a plaintiff and comparators who were all car repairmen subject to the same discipline standards. 230 F.3d 34 (2nd Cir. 2000). Regardless of any perceived different standards for comparable conduct, Hervey cannot be considered similarly situated to Mastin or his step-son because of the more basic differences in their positions, duties, and supervisors.

In affirming summary judgment against the employee, the Third Circuit in Davis v. City of Philadelphia Water Dept., which is an unpublished case that has no precedential value, does not address the positions or duties of the plaintiff's alleged comparators. 57 Fed. Appx. 90 (3rd Cir. 2003). Like the other cases cited in her Petition, Davis does not support Hervey's contention that she is similarly situated to Mastin or his step-son.

The Fourth Circuit in the case cited by Hervey, Cook v. CSX Transportation Corp., affirmed summary judgment for the employer on a Title VII race discrimination claim. 988 F.2d 507 (4th Cir. 1993). The plaintiff's comparators for similarly situated purposes were also railroad workers. The Court did not address whether the plaintiff could have been similarly situated to his supervisor or other employees with different job duties. As a result, the Cook decision does not support Hervey's claim in this case. In fact, the Fourth Circuit has held that a part-time employee could not be similarly situated to a full-time nurse for a Title VII racial

discrimination claim. Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 546 (4th Cir. 2003). Hervey fails to address how this decision impacts her attempted comparison to Rich Mastin, who only occasionally works for the County.

For her Fifth Circuit case, Hervey cites a twenty-six year old case, E.E.O.C. v. Brown & Root, Inc., which involves a female electrician's helper who was terminated for being incapable of performing assigned work when she was unable to work on an overhead steel beam. 688 F.2d 338, 339 (5th Cir. 1982). Without expressly addressing the positions and duties, the Court compared the plaintiff to male workers who also had to work on overhead steel beams for the similarly situated analysis. Id. Last year, the Fifth Circuit held that a nurse coordinator was not similarly situated to a doctor who engaged in similar misconduct because the positions were "considerably different." Strong v. University Healthcare System, L.L.C., 482 F.3d 802, 807 (5th Cir. 2007). The Court stated, "[w]e cannot assume, nor require, that hospitals discipline doctors and nurse coordinators in an identical fashion." Id.

The Sixth Circuit unpublished decision cited by Hervey, Perry v. McGinnis, involved a plaintiff and similarly situated employees consisting of his fellow hearing officers who were supervised by the same officials, subject to the same standards, and charged with the same duties. 209 F.3d 597 (6th Cir. 2000). More recently, the Sixth Circuit has confirmed its position when it held that a plaintiff was not similarly situated to a comparator where the comparator worked for a different supervisor, had

more seniority in the position, and worked in a more regional capacity than the plaintiff. Gragg v. Somerset Technical College, 373 F.3d 763, 768 (6th Cir. 2004).

Hervey's chosen Seventh Circuit case, Ezell v. Potter, demonstrates that a plaintiff must show that a comparator must be similarly situated with respect to performance, qualifications and conduct. 400 F.3d 1041, 1049 (7th Cir. 2005) (plaintiff compared to fellow letter carriers). "This normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." Id. A careful reading of Hervey's proffered cases demonstrates that she cannot be similarly situated to her supervisor or a deputy who works only occasionally for the County where they have different supervisors and duties. See also Burks v. Wisconsin Dept. of Transportation, 464 F.3d 744, 751 (7th Cir. 2006) (factors for similarly situated analysis include whether the comparators reported to the same supervisor, whether they were subject to the same standards, and whether they had comparable education, experience, and qualifications).

Again, Hervey's chosen Ninth Circuit case demonstrates the fallacy of the premise for her argument that conduct is the only relevant factor to determine whether employees are similarly situated. In Vasquez v. County of Los Angeles, the Ninth Circuit stated that, "individuals are similarly

situated when they have similar jobs and display similar conduct." 349 F.3d 634, 641 (9th Cir. 2004).

The Tenth Circuit, in Aramburu v. The Boeing Company, agreed that in order for employees to be similarly situated, they must deal with the same supervisor and be subject to the same standards governing performance evaluation and discipline. 112 F.3d 1398, 1404 (10th Cir. 1997). The Tenth Circuit's variation on conduct requiring that similarly situated employees must have violated the same rule or a similar rule does not matter if the employees are not similarly situated in the first place because of different jobs, supervisors, and standards.

Finally, Hervey's Eleventh Circuit cases, Nix v. WLCY Radio/Rahall Communications and Burke-Fowler v. Orange County, Florida, also involve plaintiffs and comparators who held the same positions with the same supervisor. 738 F.2d 1181 (11th Cir. 1984); 447 F.3d 1319 (11th Cir. 2006). In Nix, the plaintiff and comparator were both radio announcers, and in Burke-Fowler, the plaintiff and comparators were all corrections officers. Id. These cases, like the rest of the cases in Hervey's Petition, do not support her argument that she is similarly situated to Mastin and his step-son. In fact, the cases generally support the proposition that the similarly situated analysis must include a comparison of the jobs, duties, and supervisors, in addition to the conduct.

With respect to Hervey's comparison to Mastin, the differences in their positions are clear and provide no basis that they could be considered "similarly situated" for a disparate treatment

analysis. Mastin was the Undersheriff reporting directly to the Sheriff, and would (and did) perform all duties and functions of the Sheriff during a vacancy in office by operation of law. See Minn. Stat. § 375.08. Most significantly, Mastin was Hervey's supervisor. Employees in supervisory positions may not be similarly situated to their subordinates for disparate treatment purposes. See Burks v Wisconsin Dept. of Transportation, 464 F.3d 744, 751 (7th Cir. 2006); Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2004).

Hervey's comparison to Rich Mastin, an occasional fill-in deputy, is equally unavailing. Rich Mastin had no supervisory duties related to his employment by the County. He merely works on a sporadic basis for the County when he was not working as a full-time city cop. Pet.'s App., A-62. The idea that he could be similarly situated to the County's Jail Administrator, who had supervisory and administrative duties quite distinct from those of a licensed deputy, is clearly mistaken.

Without even considering the nature, extent, or severity of the conduct engaged in by Hervey, Mastin, or Mastin's step-son, the case law provides no support for the notion that Hervey could be similarly situated to them. The jobs are simply too different to allow a court to make an accurate comparison for a Title VII disparate treatment analysis. The general rule requiring the same position, duties, and supervisor for similarly situated employees is sound. When considering whether to discipline such dissimilar employees, many different factors would apply. Add in the fact that the discipline decisions in

this case would be made by different supervisors, and it is easy to see how inapt it would be to consider Hervey to be similarly situated to Mastin or his step-son.

B. Hervey Failed to Establish that she was Treated Differently than Similarly Situated Employees under any Comparable Conduct Analysis.

Even if focusing only on the comparable conduct factor of the similarly situated analysis, as Hervey would prefer, Hervey's comparisons to Mastin and his step-son still fail to demonstrate that they are similarly situated employees. The conduct of Mastin cited by Hervey consisted of a few unrelated, isolated incidents that occurred over several decades. Pet.'s App., A-13. With respect to Rich Mastin, the conduct cited by Hervey consisted of one off-duty incident that was unrelated to his part-time work for the County. Id., at A-14. On the other hand, Hervey engaged in repeated acts of workplace misconduct over a relatively short span of time. Hervey's persistent refusal to follow directions cannot logically be compared to the alleged isolated misconduct of John Mastin or Rich Mastin, regardless of which variation of the similarly situated standard is utilized. The Eighth Circuit held that Hervey's comparison failed because she could not show the same conduct. However, the evidence in the record demonstrates that the conduct of Hervey and her comparators was not of comparable seriousness, did not involve similar circumstances, was not similar in all relevant aspects, and did not involve violation of the same or similar rule.

Hervey was disciplined for repeated and persistent acts of insubordination occurring over a relatively short span of time, under the same supervisor and Sheriff. For example, Hervey refused to acknowledge the Department's reporting lines, refused to help find budget savings for the jail as directed, went over her supervisors' heads, complained about new duties and budget procedures, and took unauthorized absences. Pet.'s App., A-13. The record is replete with evidence that Hervey was insubordinate on a persistent basis. Hervey failed to show that any male employees were disciplined less severely for anything approaching similar repeated workplace misconduct.

The Eighth Circuit held that Hervey's comparison to Mastin involved circumstances that are "substantially different." Pet.'s App., A-13. Mastin's incident of alleged misconduct occurred many years ago, under a different Sheriff, and did not involve a pattern of behavior. Hervey's attempts to compare her discipline with Mastin's isolated incident of alleged misconduct was found equally unavailing by the Eighth Circuit, and would not support a reversal of summary judgment under any of the other Circuit's variations of the similarly situated standard.

The Eighth Circuit also found that Rich Mastin's misconduct, for which he was disciplined by his full-time employer, was not similar to Hervey's insubordination, and that the two employees were not similarly situated in all relevant respects for purposes of disparate treatment analysis. Id., at A-14. Rich Mastin, an occasional fill-in deputy who was

involved in off-duty misconduct, cannot be used as a viable comparator to Hervey, regardless of the variation of the similarly situated standard used. As a result, this case does not present the proper facts to consider the appropriate comparator test. Contrary to Hervey's assertion, the Eighth Circuit's analysis does not prevent Hervey from proving differential discipline. Pet., p. 22.

Different Circuit Courts of Appeal have applied slight variations of the similarly situated factors to analyze comparators for disparate treatment purposes. See Pet., pp. 23-25. While the Eighth Circuit accurately held that Hervey failed to provide any evidence of a similarly situated male employee receiving different treatment, Hervey attempts to seize upon the variations by other Circuits to frame the issue as a full-blown Circuit split. Contrary to Hervey's assertion, the "split among the Circuits" amounts to little more than slight variations of framing the issue, ranging from the "same offense" version to "comparable seriousness" to "similar circumstances." Under any version of the similarly situated standard, Hervey's claim fails as a matter of law.

Even assuming that a split exists, this case would not provide the appropriate facts to address the alleged conflict. As the record demonstrates, Hervey's claims would fail regardless of which variation of the comparator test is used. Hervey's failure to provide evidence that she was treated differently than a similarly situated employee cannot be salvaged by her alleged Circuit conflict relating to comparable conduct. Whether the issue is framed as

the "same conduct," "comparable seriousness," or "similar circumstances," Hervey fails to meet the standard in this case. Hervey's repeated workplace insubordination over a short period of time is not comparable to the alleged isolated, off-duty, or stale incidents of Mastin and his step-son. Hervey cannot set forth any standard that would allow her to prevail in this case. Accordingly, the Court should not grant the Writ.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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